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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

MILLERS NATIONAL INSURANCE COMPANY;
JOHN CAULFIELD, dba CAULFIELD
TRUCKING; DONALD PRESTON THURMAN

Petitioners,

v.

AXEL'S EXPRESS, INC.

FIREMAN'S FUND INSURANCE COMPANY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO NINTH CIRCUIT COURT OF APPEALS THE COURT OF APPEALS OF CALIFORNIA

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35 pp

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does a dispute concerning liability for serious bodily injury between a motor carrier operating in interstate commerce pursuant to Federal Regulations and the owner of a vehicle leased to the motor carrier, pose a substantial question of federal law so as to vest jurisdiction in the Federal District Court?

2. Does a dispute between two insurers, one covering the motor carrier and the other covering the vehicle owner, involving coverage for liability for serious injury, which occurred during a shipment in interstate commerce, pose a substantial federal question when resolution of the dispute depends on liability under Federal Law as well as rules governing insurance of the interstate motor carrier?

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PARTIES TO THE PROCEEDING

All parties contained in the caption of this case are parties to this proceeding.

None of the petitioners in this action have or are corporate affilliates or subsidiaries or are affilliated with any other corporation.

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REFERENCE TO OPINIONS BELOW

Entry of judgment by the United States District Court, Central District of California, was entered October 9, 1987, and is reprinted in Appendix 1a.

The United States Court of Appeals for the Ninth Circuit affirming the lower entered July 1, 1988, was reported at 851 F.2d 269 (9th Cir. 1988) and is reprinted in Appendix 3a.

The Petition for rehearing was denied by United States Court of Appeals without opinion on July 28, 1988, and is reprinted in Appendix 13a.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) permitting the United States Supreme Court to review by Writ of Certiorari, a Civil Case in the Court of Appeals before or after rendition of judgment.

In cases which the petition is from a denial of petition for rehearing by the Court of Appeals, the time runs from the date of denial (Supreme Court Rule 20.4). The ninetieth day after denial is October 28, 1988. This Petition was filed on or before October 28, 1988.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the allegations of liability of motor carriers operating in interstate commerce under the Motor Carrier Act of 1980, 49 CFR 10101 et seq. and regulations codified by the Interstate Commerce Commission set forth at 49 CFR part 1057.

This case also involves the allegation of liability of the insurer of the motor carrier under the Motor Carrier Act of 1980, 49 USC §10101 et seq. and Regulations codified by the Interstate

Commerce Commission set forth at 49 CFR part 1043.

STATEMENT OF FACTS RELEVANT TO ISSUE ON REVIEW

This case arises because of an accident which occurred on June 16, 1985, in Utah. The accident resulted in severe personal injuries to JAMES GAGNER.

GAGNER was standing between his car and travel trailer parked along side the highway when a truck driven by Petitioner DONALD PRESTON THURMAN (THURMAN) struck the rear of the trailer. As a result, GAGNER'S leg was amputated and he had to undergo neurological surgery.

The tractor, driven by THURMAN was owned by JOHN CAULFIELD.

At the time of the accident, AXEL'S EXPRESS, held a certificate of public convenience and necessity issued by the Interstate Commerce Commission

authorizing AXEL'S to haul general commodities as a common carrier in interstate commerce pursuant to 49 USC 10101, et seq. (app. 7a)

At the time of the accident, CAULFIELD had leased the tractor to AXEL'S. The tractor was being operated under the control and responsibility of AXEL'S under a written lease agreement pursuant to 49 U.S.C. §11107 and the ICC Leasing Regulations set forth at 49 CFR part 1057. The identity of AXEL'S was contained on CAULFIELD'S equipment pursuant to 49 CFR §1057 (App. 7a-9a). Neither CAULFIELD nor THURMAN were licensed by any state or federal agency to conduct transportation services.

At the time of the accident, THURMAN was hauling a trailer belonging to AXEL'S. The trailer contained commodities for which AXEL'S had issued a

bill of lading from California to Salt Lake City, Utah. The accident occurred prior to delivery of the goods and while THURMAN was driving the tractor without the trailer, and attempting to retrieve his identification papers which had been left behind at the Arizona/Utah boarder check.

CAULFIELD was insured by MILLERS NATIONAL INSURANCE. AXEL'S was insured by FIREMAN'S FUND. FIREMAN'S FUND had filed a Certificate of Insurance with the Interstate Commerce Commission with the required endorsement which provides coverage for protection of the public in compliance with Title 49 U.S.C. §10927.

GAGNER filed a complaint in the Utah State Court for damages against CAULFIELD, THURMAN and AXEL'S.

A settlement was reached in the GAGNER action whereby FIREMAN'S FUND, on behalf

of its insured, AXEL'S EXPRESS, agreed to contribute $450,000 toward settlement, and MILLERS NATIONAL, on behalf of its insured, CAULFIELD and THURMAN, agreed to contribute $200,000 toward settlement of the GAGNER action. FIREMAN'S FUND AND MILLERS agreed to reserve the issue of the ultimate liability as between them as part of the settlement.

COURSE OF UNDERLYING PROCEEDINGS

MILLERS NATIONAL INSURANCE COMPANY, INTERSTATE TRUCK UNDERWRITER'S, INC., JOHN CAULFIELD dba CAULFIELD TRUCKING, AND DONALD PRESTON THURMAN, filed a complaint in the Federal District Court against AXEL'S EXPRESS, INC., and FIREMAN'S FUND INSURANCE COMPANY for damages, declaratory relief and for insurance bad faith. The parties subsequently stipulated to dismiss the cause of action for bad faith.

FIREMAN'S filed an Answer and Counterclaim against MILLERS NATIONAL INSURANCE COMPANY, INTERSTATE TRUCK UNDERWRITERS, INC., JOHN CAULFIELD dba CAULFIELD TRUCKING and DONALD PRESTON THURMAN for declaratory relief and damages.

At the pre-trial conference, for the first time, the court orally raised the question of federal subject matter jurisdiction.

At the request of the trial court, MILLERS submitted a Memorandum of Points and Authorities Regarding Jurisdiction of the U.S. District Court.

The trial court then raised additional questions of jurisdiction and issued a Further Order to Show Cause re Jurisdiction. (App. 16a).

At the request of the trial court MILLERS submitted a subsequent Memorandum

of Points and Authorities re Federal Jurisdiction of the Insurance Coverage.

On October 7, 1987, the court filed its Order of Dismissal on the basis the question of liability among the motor carrier and the owner/operator was no longer at issue and that the court had no jurisdiction of any dispute between the insurers. (See Appendix 1a-2a).

MILLERS filed an appeal to the U.S. Court of Appeals for the Ninth District on November 9, 1987. The Court of Appeals affirmed the trial courts ruling on July, 1, 1988 (App 5a). The request for rehearing was denied without opinion on July 28, 1988 (App. 5a).

BASIS OF FEDERAL JURISDICTION OF FIRST INSTANCE

The subject matter of this Petition is of Federal Jurisdiction of First Instance.

CONSTITUTIONAL PROVISIONS - Statutes and Regulations

Relevant Text of Statutes and Regulations are Set Out in Appendix A.

A. United States Code

Motor Carrier Act of 1980
49 USC §10101 et seq.

1. 49 USCS 10101 (app. 20a)

2. 49 USCS 10927 (app. 23a)

3. 49 USCS 11107 (app. 24a)

B. U.S. Code of Federal Regulation

1. Interstate Commerce Commission Equipment Regulation 49 CFR Part 1043 (app. 27a)

2. Interstate Commerce Commission Insurance Regulations 49 CFR Part 1057 (app. 30a)

ARGUMENT IN FAVOR OF ALLOWING WRIT

This case presents an important question of subject matter jurisdiction: Does the Federal District Court have jurisdiction to determine the liability of a motor carrier regulated by a federal

agency and whose conduct and liability is strictly governed by federal law. A second equally important question is whether questions involving insurance coverage in a dispute involving a federally regulated motor carrier is the subject matter jurisdiction of the Federal District Court. The trial court and the Court of Appeals incorrectly held that the issue of the motor carrier's liability was not at issue since the third party had already been compensated. The Court of Appeals also incorrectly applied the Supreme Court decisions in Merrell Dow Pharmaceuticals, Inc. vs. Thompson, 478 U.S. 804; 92 L.Ed.2d 650, 54 U.S.L.W. 5088; 1065 S.Ct. 3229 (1986) and Smith v. Kansas City Title & Trust Co. 255 U.S. 180 (1921), by holding that the issues of insurance coverage of a motor carrier do not arise under federal

law.

This court should grant certiorari so as to clarify (1) whether a cause of action to determine liability of a motor carrier regulated by the Interstate Commerce Commission is a substantial federal question vesting jurisdiction in the Federal District Court, and (2) whether a cause of action to determine liability of an insurer of a motor carrier regulated by the Interstate Commerce Commission is a determination of a substantial federal question vesting jurisdiction in the Federal District Court.

I

WHERE FEDERAL STATUTE AND REGULATIONS GOVERN THE LIABILITY OF A MOTOR CARRIER FOR DAMAGES CAUSED BY A LEASED VEHICLE, A DETERMINATION OF THE MOTOR CARRIER'S LIABILITY IS A DETERMINATION OF A "SUBSTANTIAL" FEDERAL QUESTION SO AS TO VEST SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT.

A. THE DETERMINATION OF LIABILITY OF THE MOTOR CARRIER IS A SUBSTANTIAL FEDERAL QUESTION AND DENYING FEDERAL JURISDICTION OVER THE ISSUE WOULD BE INCONSISTENT WITH THE RULE CITED IN SMITH vs. KANSAS CITY TITLE & TRUST CO. 275 U.S. 180 (1921) and MERRELL DOW PHARMACEUTICALS, INC. vs. HENDERSON, 478 U.S. 804; 92 L.Ed.2d. 650; 51 U.S.L.W. 5088; 106 (1986).

Pursuant to the Commerce Clause, Congress and the ICC have preempted common law and state law concerning the liability of independent contractors by holding motor carriers statutorily liable

for the acts of a leased driver and vehicle. Proctor & Colonial v. Refrigerator Transportation Inc., 494 F.2d 89 (4th Cir. 1974).

Congress created the ICC and the laws governing motor carriers in order to develop a sound uniform transportation system. Simmons v. King 478 F.2d 857 (5th Cir. 1973).

For the purpose of insuring uniformity of commerce among the several states, the commerce clause of the Constitution provides that Congress shall have the power to "Regulate Commerce with Foreign Nations and Among the Several States". Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465 (1885); Wellon v. State of Missouri, 91 U.S. 275 (1875); Cook v. Pennsylvania, 97 U.S. 275 (1878); Cook v. Marshall County 196 U.S. 201 (1904).

Pursuant to the commerce clause,

Congress empowered the Interstate Commerce Commission to regulate transportation conducted between a place in one state to a place in another state. (49 U.S.C. §10521(a)). Congress also prohibited transportation in interstate commerce unless an appropriate license had been obtained from the Interstate Commerce Commission. (49 U.S.C. 10927, et seq).

Pursuant to 49 U.S.C. §11107, the ICC promulgated the leasing regulations regulating the leasing of Motor Vehicles by Motor Carriers. (49 CFR part 1057).

The leasing regulations contain an extensive set of rules which permits the motor carrier to provide transportation services through the use of leased equipment and drivers. The relevant portions of these regulations include: requirements that the lease be in

writing. 49 CFR 1057. 11(a); that receipts be provided for possession of the equipment, 1057.11(b); that the leased equipment contain the identification of motor carrier 1057.11(c); that the motor carrier assume exclusive possession and control of the equipment, 1057.12(c); and that the motor carrier maintain insurance coverage for the leased vehicle, 1057.12(i).

The leasing regulations established by the Interstate Commerce Commission were thoroughly discussed in Transamerica Freight Lines, Inc. v. Brada Miller Freight Systems, Inc. 423 U.S. 28 (1975). After review of the history of these regulations, the court in Brada Miller recognized that the importance of the leasing regulation was to enforce the motor safety regulation and to fix financial responsibility for damage and

injuries to shippers and members of the public (423 U.S. 28.37).

Despite the wishes of Congress, review of State Court and Federal decisions reveals a lack of uniformity in deciding the liability of motor carrier vs. the vehicle owner/lessor (Rodriguez v. Ager (10th Cir. 1983) 705 F.2d 1229).

A cause of action will arise under a Federal law vesting Federal jurisdiction over a claim in two situations; one, if the Federal Statute expressly creates a cause of action. Franchise Tax Board v. Construction Laborer's Vacation Trust, 463 U.S.1 (1983) at 8-9, or second, when there appears that some substantial disputed question of Federal Law is a necessary element of one of the well-pleaded state claims. Franchise Tax Board vs. Construction Laborers Vacation Trust, 463 U.S. at 13. The type of claim

which will create a substantial federal question was described in Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). "The General Rule is that where it appears from the bill or statement of the complaint that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, under the statute granting federal question jurisdiction" 223 U.S. at 199.

The Court of Appeals cited the Supreme Court's recent decision of Merrell Dow Pharmaceuticals Inc. v. Henderson 470 U.S. 804; 92 L.Ed.2d 650, 511 U.S.L.W. 5088 (1986) to support its decision that the issue of insurance coverage under a motor carrier's policy does not arise under federal law (App 11a). The Merrell

Dow decision held that a state cause of action for product liability which alleges violation of the labeling requirement of the Food and Drug Act as an element of that action does not "arise under" the Federal law in statute so as to vest jurisdiction in the Federal District Court. The court in Merrell Dow concluded that since Congress did not provide for an express cause of action under the Food and Drug Act, the Act was not a substantial federal interest so as to vest jurisdiction in the federal court. (478 U.S. 812).

The decision in Merrell Dow, however, did not eliminate the "Arising under" jurisdiction when the Federal Statute fails to create an owner's cause of action, as was suggested by the Court of Appeals (App. 10a). Justice Brennan argued in his dissent of MERRELL DOW,

that the Rule of Smith v. Kansas City Title & Trust was not overruled by Merrell Dow. 478 U.S. 820.

The federal issue in the present case is not merely an element of a state cause of action. The Federal Regulatory Scheme creates strict liability on the motor carrier for the conduct of drivers of leased equipment. Proctor & Colonial v. Refrigerator Transportation, Inc., 91 F.2d 89 (1974). The driver is deemed to be the employee of the motor carrier so as to assure the general public an adequate avenue of recourse in the event of injury.

The Rule of Smith was not properly applied to the cause of action to determine liability of AXEL'S under the Federal Regulatory Scheme. This Petition should be granted to properly consider the jurisdiction of that claim.

B. THE TRIAL COURT AND THE COURT OF APPEALS INCORRECTLY CONSIDERED THE ISSUE BEFORE THEM BY ONLY CONSIDERING THE ISSUE OF INSURANCE COVERAGE.

The trial court recognized that the determination of liability of a motor carrier regulated by the Interstate Commerce Commission to the insurers caused by a leased vehicle is a substantial federal question and vests jurisdiction in the District Court. (See Appendix 2A) The trial court incorrectly held, however, that the determination of the motor carrier's liability was no longer at issue and that only the issue of insurance coverage was at issue[1]. (See Appendix 2A).

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[1] It is further alleged by petitioner that the determination of insurance coverage also is a substantial federal question.

The court's assessment that the motor carrier's liability is no longer at issue is incorrect. As discussed in Part A of this argument, the Federal Regulatory Scheme requires the motor carrier to assume complete control and responsibility of a leased vehicle and its driver. In order to ensure the safety of the public from the operations of motor carriers utilizing non-owned equipment, Congress empowered the ICC to enact regulations which would permit the motor carriers use of non-owned equipment on the conditions that the motor carrier assumes control and responsibility of the motor vehicle and obtain liability insurance of the vehicle (49 U.S.C. §11107, Indiana Refrigerator Lines, Inc. v. Dalton (1975 Cal.App.6 Tenn.), 516 F.2d 795, Cert. denied, 423 U.S. 985, 46 L.Ed. 302, 96 S.Ct. 392 (1975). Further

in its authority over interstate commerce, Congress required the ICC to issue operating authority only to carriers that maintain insurance to pay for any final judgments against the carrier for bodily injury resulting from the negligent operation of a motor carrier under the issued authority (49 U.S.C §10927).

Based on this regulatory scheme, the motor carrier is liable for injuries to the third party caused by the driver of the leased vehicle while operated on behalf of the motor carrier. The vehicle lessor is responsible for its own negligence directly causing the injuries, but is not legally liable for the conduct of the driver of the vehicle leased to the motor carrier. By the terms of the motor carrier's insurance policy and by Federal regulations, the motor carrier's

insurer must assume coverage for the operation of the leased vehicle. Finally the insurer of the leased vehicle's owner does not provide coverage for damages caused while the vehicle is leased to the motor carrier and for vehicles for which the motor carrier is held liable.

Based on these regulations, the issue of the motor carrier's liability is primary to that of the insurer's coverage and must be decided before the question of insurance coverage can be decided. Both the factual paragraph and the introductory paragraph to the discussion by the Court of Appeals recognized Petitioner's argument that the purpose of this lawsuit is to determine the liability of the motor carrier and that such determination must be made prior to deciding the issue of insurance coverage. The Court of Appeals, however, reached

its decision to deny jurisdiction by applying the rule of "Substantial Federal Question" cited in Merrell Dow vs. Thompson to the question of insurance coverage (See Appendix 11A). The question of whether liability of the motor carrier is a "substantial Federal question" was never fully addressed.

C. THE ISSUE OF INSURANCE COVERAGE IS ALSO AN IMPORTANT FEDERAL INTEREST WHICH MUST BE ENFORCED ON A UNIFORM BASIS SO AS TO CREATE A UNIFORM TRANSPORTATION SYSTEM.

In response to 49 USC §10927, the ICC has devised an expansive set of regulations which requires a motor carrier to assume full coverage for injuries occurring during the operation of motor vehicles operating under the

insurer's carrier's policy. 49 CFR 1043 app. 27a, 49 CFR 1057.12(C) app. 29a.

Just as courts have differed on the effect of ICC leasing regulations on the liability of the motor carrier/lessee, State and Federal Courts have also radically differed on the interpretation of the laws concerning insurance coverage for regulated motor carriers.

One line of cases has held that a motor carrier's public liability policy is primary to that of the vehicle owner's policy due to the public liability endorsement required by 49 U.S.C. 10927 and, 49 CFR part 1043. Argonaut Insurance Co. v. National Indemnity Co., 435 F.2d 710 (10th Cir. 1971).

Another line of cases has held that a motor carrier's insurance policy only provides excess coverage and that coverage was not altered by the attached

ICC endorsement. Hagans vs. Glen Falls Insurance Co., 465 F.2d 1249 (1972); (Paxton National Insurance Co., Transport Indemnity Insurance, 657 F.2d 656, 659-60 (5th Cir. 1981), Cert. denied, 455 U.S. 657 (1982). (It should be noted that Justice White would grant Certiorari in Paxton National Insurance vs. Transport Indemnity to resolve the conflict between the decisions of Argonaut Insurance Co. v. National Indemnity Co. and Hagans vs. Glens Falls Insurance Co. 465 F.2d 1249 (1972).

Allowing individual courts to interpret these federal regulations could very well cancel out the intent of Congress that the motor carrier assume the financial responsibilities of its operation.

The issue of insurance coverage by an insurer of a motor carrier for the

liability to the public is a substantial federal interest which requires uniformity in its enforcement by the Federal District Court.

DATED: 10/25/88

FARANO AND KIEVIET

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